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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

JOSEPH FURROW,
Petitioner,

VS.

BARRY A. BISSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an award of contractual attorneys' fees to an attorney-litigant who represents himself granted in contravention of both state and federal law, constitutes a violation of the Fourteenth Amendment guarantees to due process and equal protection under the law.

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JOSEPH FURROW,
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PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL GROUNDS FOR PETITION

This Petition for Writ of Certiorari is taken from an order of the California Supreme Court dated January 18, 1996 dismissing Petitioner's action, of which review had previously been ordered on August 31, 1995. (Appendix Exhs. A and B, respectively) This Petition is timely and proper pursuant to Rules of the Supreme Court of the United States, Rule 13.1 and 28 U.S.C. section 2101 subdivision (c).

CONSTITUTIONAL OR STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner contends that in awarding attorneys' fees to Respondent despite virtually unanimous state and federal authority holding that it is fundamentally unfair for an attorney-litigant to recover attorneys' fees for self-representation while a non-attorney litigant cannot, the California courts have arbitrarily and capriciously denied him due process and equal protection under the law.

STATEMENT OF THE CASE AND PRESENTATION OF THE ISSUE BELOW

Petitioner Joseph Furrow ("Furrow") retained attorney Barry Bisson ("Bisson") to represent him in a civil matter. The parties entered into a written retainer agreement which included an attorneys' fee clause. Thereafter Furrow sued Bisson for malpractice and fraud arising out of Bisson's representation of Furrow. Bisson cross-complained for breach of contract, seeking unpaid fees incurred during his representation of Furrow. The case went to trial with both parties representing themselves in pro per. The jury rendered general verdicts in favor of Bisson on both the complaint and the cross-complaint. By stipulation, damages were tried to the court.

Although the trial court held that Bisson never timely filed a declaration sufficient to allow the court to accurately assess reasonable attorneys' fees pursuant to the retainer agreement, the court noted that the trial lasted for 20 days, and awarded Bisson \$20,000 as "reasonable attorneys fees."

Although Furrow did challenge the award of attorneys' fees to Bisson on various grounds in his opening brief to the appellate court, he did not specifically raise the issue in the context of whether or not an attorney litigant is entitled to recover attorneys' fees when he has represented himself because then-existing California law did not appear to support that position. To the contrary, at that time, several recent appellate decisions in California had held that an

attorney litigant can recover attorneys' fees for the time and effort spent litigating on his own behalf. (See, for example, *Dameshigi v. Texaco Refining & Marketing, Inc.* (1992) 3 Cal.App.4th 1262, 1290-1291, *Renfrew v. Loysen* (1985) 175 Cal.App.3d 1105, 1107-1110).¹

After the appellate briefing was complete, however, California's Second Appellate District, Div. Four rendered its opinion in *Trope v. Katz* (1994) 28 Cal.App.4th 1409 holding that an attorney who represented himself was not entitled to recover statutory or contractual attorneys' fees since he had not incurred any such fees and was not obligated to pay any such fees. Thereafter, the California Supreme Court granted review and the case was still pending at the time of oral argument in the instant action.

Furrow began his oral argument before the appellate court with a citation to and discussion of the *Trope* case and argued at length that Bisson was not entitled to attorneys' fees because he had represented himself and had not incurred any obligation to pay attorneys' fees. The appellate court indicated its familiarity with the *Trope* holding. Nevertheless, the appellate court affirmed without reference to the issue of attorneys' fees being awarded to a self-represented attorney litigant.

On or about July 21, 1995 appellant, still acting in pro per, filed a Petition for Review in the California Supreme Court. (Supreme Court Case No. SO47806) The first and primary issue raised in the Petition was that the appellate court erred in affirming the award of attorneys' fees to Bisson because Bisson had represented himself in pro per and had not incurred any legal fees. In his Petition, Furrow correctly indicated that the issue of whether an attorney acting in pro per can recover attorneys' fees pursuant to a contractual

¹These decisions have since been disapproved by the California Supreme Court in *Trope v. Katz* (1995) 11 Cal.4th 274, at 292.

attorney fee provision was then pending before the California Supreme Court in *Trope v. Katz*. The Supreme Court granted review on August 31, 1995, but deferred briefing pursuant to California Rules of Court, rule 29.3. (Appendix, Ex. 1)

On October 2, 1995 the California Supreme Court issued its unanimous opinion in *Trope v. Katz* (1995) 11 Cal.4th 274 holding that attorneys acting in pro per may not recover attorneys' fees when such fees are provided for by contract or statute. In so holding, the Court acknowledged that "it would be palpably unjust" for a lawyer litigant to remain eligible for attorneys' fees while other pro per litigants are not. (*Id.*, p. 286)

As a general rule, when review is granted on a "grant and hold" basis as in this case, once the "lead" case (here, *Trope v. Katz*) is decided, held cases in which the appellate decision agrees with the Supreme Court's disposition of the lead case are generally dismissed as "improvidently granted" under California Rules of Court, rule 29.4 subdivision (c). On the other hand, held cases in which the appellate court opinion is in conflict with the Supreme Court's disposition in the lead case are generally transferred to the Court of Appeal pursuant to California Rules of Court, rule 29.4 subdivision (e) for reconsideration of the opinion in light of the lead case.

Nonetheless, although on its face the *Trope* decision is virtually indistinguishable from the instant case and wholly supportive of Furrow's claim that Bisson was not entitled to recover attorneys' fees for the time he spent representing himself, Furrow's Petition was dismissed pursuant to California Rules of Court, rule 29.4 subdivision (c) and the matter remanded to the Court of Appeal without instruction with the result that the trial court's award of \$20,000 in

attorneys' fees to Bisson for his self-representation remains affirmed.²

LEGAL ARGUMENT

THE SUPREME COURT'S FAILURE TO TRANSFER THE CASE TO THE APPELLATE COURT FOR RECONSIDERATION IN LIGHT OF THE *TROPE* HOLDING CONSTITUTES A VIOLATION OF PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS.

Furrow contends that because the *Trope* case was decided favorably to him, because his case is indistinguishable from *Trope* in all pertinent respects, and because the Court of Appeal's decision affirming the award of attorneys' fees directly conflicts with *Trope*, the matter should have been transferred to the appellate court pursuant to California Rules of Court, rule 29.4 subdivision (e) with instructions to modify its decision in accordance with the *Trope* holding. It was not, and the result is that Furrow was denied due process and equal protection under the United States Constitution.

A. This case is legally indistinguishable from *Trope v. Katz*

In *Trope v. Katz* (1995) 11 Cal.4th 274, a law firm ("*Trope*") sued its former client for fees alleging breach of

²Upon the Court of Appeal's issuance of its remittitur, Furrow filed a Request to Recall the Remittitur, citing *Trope* and the apparent error by the California Supreme Court in dismissing the action without instructions to the appellate court to reconsider its decision in light of *Trope*. This request was denied February 5, 1996. Furrow thereafter filed a Petition for Review to the California Supreme Court from the February 5, 1996 order. That Petition is still pending.

their written retainer agreement. The retainer agreement contained the following language:

In the event it becomes necessary to file an action to recover the fees and costs set forth in this agreement, the Court may award reasonable attorneys' fees for the recovery of said fees and costs.

The client ("Katz") filed a cross-complaint for legal malpractice. The Trope firm chose to represent itself in propria persona rather than retain an attorney to represent its interests. A net judgment was entered in favor of the Trope firm, whereupon Trope moved for an award of attorneys' fees. It was undisputed that had Trope been represented by counsel, it would have been entitled to such an award. The issue taken up by the California Supreme Court was "whether an attorney who chooses to represent himself — and therefore does not pay or become liable to pay any sum out of pocket for such representation — can nevertheless recover 'reasonable attorney's fees' under [Civil Code] section 1717 as compensation for the time and effort expended and the professional business opportunities lost as a result."³ (*Id.*, p. 279) The answer was a resounding "no".

After carefully reviewing the history of attorneys' fee awards in California, the California Supreme Court unanimously concluded that Civil Code section 1717 expressly provides for attorneys' fees which are incurred to enforce a contract, and that "to incur" means "to become liable" for it ... become obligated to pay it." (*Id.*, p. 280 [emph. in original]).

³California Civil Code section 1717 provides, in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, ... shall be entitled to reasonable attorney's fees."

Beyond the mere language of the statute however, the Court noted that to hold otherwise would result in unfair and disparate treatment of self-represented non-attorney litigants. While the time an attorney spends litigating on his own behalf is valuable, so too is the time a doctor, architect, painter or any other pro per litigant spends, and they are not entitled to recover for the valuable hours they devote to their own cases. The *Trope* decision also noted that many federal courts, including the U.S. Supreme Court, have reached the same conclusion. (See, for example, *Kay v. Ehrler* (1991) 499 U.S. 432, 435 & fn. 5 [113 L.Ed.2d 486, 491, 111 S.Ct. 1435] holding that federal circuit courts have unanimously and correctly held that nonattorney pro se litigants cannot recover reasonable attorney's fee under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988). (*Trope*, p. 285)

In the instant case, the roles of the parties were reversed from those in *Trope*. Here, Furrow filed his complaint for malpractice and fraud first. Attorney Bisson's cross-complaint for breach of the retainer agreement followed.⁴ The difference is inconsequential. Ultimately, Bisson was the "prevailing party" and had he been represented by an attorney in his action to recover his own fees on the cross-complaint, and had he actually incurred legal fees to prosecute the action, he undoubtedly would have been entitled to an award of attorneys' fees upon appropriate motion. However, Bisson, like the Trope firm, did not hire a lawyer to represent him. Instead, he chose to represent himself.

⁴It must be noted that Petitioner does not herein challenge the trial court's award of damages to Bisson for Furrow's alleged breach of the retainer agreement. That award was for hourly fees purportedly earned by Bisson during his representation of Furrow and does not fall within the scope of the *Trope* holding. Here, the only award being challenged is the award of \$20,000 in fees to Bisson for his representation of himself in the action against Furrow.

Therefore Bisson, like the Trope firm, incurred no legal fees, and he, like the Trope firm, should be precluded from recovering "attorneys' fees" because he is not obligated to pay any attorneys' fees.

B. The failure to transfer the matter to the appellate court for reconsideration in light of the *Trope* holding constitutes a denial of due process

Due process of law fundamentally requires a fair proceeding. *Boddie v. Connecticut* (1971) 401 U.S. 371, 375 [28 L.Ed.2d 113, 91 S.Ct. 780].

"No matter how complete the panoply of procedural devices which protect a particular liberty or property interest, due process also requires that those procedures be neutrally applied." (*Ciechon v. City of Chicago* (7th c., 1982) 686 F.2d 511, 517, citing *Wong Yang Sun v. McGrath* (1950) 339 U.S. 33, 50, 94 L.Ed. 616, 70 S.Ct. 445).

"'Substantive due process' means . . . that state action which deprives [a person] of life, liberty, or property must have a rational basis — that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.'" (*Jeffries v. Turkey Run Consolidated School District* (7th c., 1974) 492 F.2d 1.)

Here, as discussed above, California law and federal law agree that it is fundamentally unfair for an attorney litigant to be allowed to recover "attorneys' fees" for representing himself when a non-attorney litigant cannot. Nevertheless, in this case, inexplicably, Petitioner has been ordered to pay \$20,000, an enormous sum for a 77 year old retired non-attorney on a fixed income. Because the order subjecting Mr. Furrow to this burden is absolutely violative of state and federal law, it's enforcement is arbitrary, capricious, fundamentally unfair and utterly unrelated to any legitimate state interest. As such, this Petition should be granted in order to

correct a grievous violation of fundamental due process principles.

C. The failure to transfer the matter to the appellate court for reconsideration in light of the *Trope* holding constitutes a denial of equal protection.

Equal protection demands, at a minimum, that laws be applied in a rational and nonarbitrary way. This requires a showing that application of the law 'rationally furthers some legitimate, articulated state purpose and therefore does not constitute invidious discrimination.' (*Ciechon v. City of Chicago* (7th c., 1982) 686 F.2d 511, 522)

The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the Fourteenth Amendment. (*Shelley et ux. v. Kraemer et. ux.* (1948) 334 U.S. 1, 1, [68 S.Ct. 836, 92 L.Ed. 1161].)

Here, as discussed above, there is no conceivable basis for distinguishing this case from the *Trope* case, in which a unanimous California Supreme Court held that an attorney representing himself is not entitled to recover attorneys' fees. Yet, by dismissing Petitioner's case without directions to the appellate court to reconsider in light of the *Trope* decision, the Supreme Court has intentionally, irrationally and arbitrarily misapplied California law to Petitioner's great detriment.

Had Mr. Furrow prevailed at trial, he would not have been entitled to any reimbursement for the time and effort be spent representing himself. And, if the California Supreme Court meant what it said in its unanimous *Trope v. Katz* opinion, Mr. Bisson should not have been entitled to any reimbursement for the time and effort he spent representing himself, either. Yet, despite this clear pronouncement of law which, if applied, would result in fair and equal treatment of all "pro per" litigants, Petitioner finds himself

unequally and unfairly required to pay Bisson "attorneys' fees" which Bisson never incurred.

This application of the law can only be described as capricious, irrational and clearly violative of Petitioner's right to equal protection under the law and this Petition should be granted to correct this grievous injustice.

DATED: April 15, 1996

Respectfully submitted,

MAZUR & MAZUR

By: JANICE R. MAZUR,
Attorneys for Petitioner

APPENDIX A

A-1

No. 4/3 G013643 - S047806

IN THE SUPREME COURT OF CALIFORNIA
IN BANK

JOSEPH FURROW, *Appellant*

v.

BARRY A. BISSON, *Respondent*

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division Three.

LUCAS

Chief Justice

MOSK

Associate Justice

KENNARD

Associate Justice

ARABIAN

Associate Justice

BAXTER

Associate Justice

GEORGE

Associate Justice

Associate Justice

STAMP

Supreme Court

FILED

Jan 18 1996

Robert Wandruff Clerk

Deputy

APPENDIX B

B-1

ORDER GRANTING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
Fourth Appellate District, Division Three,
No. G013643 - S047806
IN THE SUPREME COURT OF CALIFORNIA

JOSEPH FURROW, *Appellant*

v.

BARRY A. BISSON, *Respondent*

Appellant's petition for review GRANTED.

Submission of additional briefing, otherwise required by rule 29.3, California Rules of Court, is deferred pending further order of the court.

STAMP
Supreme Court
FILED
Aug 31 1995
Robert Wandruff Clerk
H. CRUZ
Deputy

LUCAS

Chief Justice

MOSK

Associate Justice

KENNARD

Associate Justice

ARABIAN

Associate Justice

BAXTER

Associate Justice

GEORGE

Associate Justice

WERDEGAR

Associate Justice